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Supreme Court, U.S.
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No. : 02-406

In the

Supreme Court of the United States

October Term, 2002

FORD MOTOR COMPANY,

Petitioner,

v.

KATHLEEN MADALINE JARVIS,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Fed.R.Civ.P. 49

Fed.R.Civ.P. 51

PETITIONER'S REPLY MEMORANDUM

In her opposition respondent does not dispute that the momentous issues presented in Ford Motor Company's (Ford") petition merit review by this Court. Indeed, by her silence respondent concedes that conflict and confusion reign in this area of federal law and procedure. Instead, via a tortured distraction, respondent attempts to position this case outside the conceded decisional chaos about inconsistent verdicts, hoping to avoid the Court's review. Respondent's avoidance strategy consists of two gambits. Both fail utterly. Thus, respondent first argues, incredibly, that the verdict in this case was not inconsistent. But, respondent's argument is contrary to the holding of the circuit court here, to the holding of the district court here, to the law of the case as set forth in the instructions to the jury in this case, and to basic principles of the law of products liability.

Second, respondent argues that since the Rule 49(a) special verdict everyone dealt with at trial was later found by the panel majority to constitute, instead, two "general verdicts," purportedly to be governed retrospectively by Rule 51, this case thereby falls outside the circuit court fray described in Ford's petition. But this contention only begs the pivotal questions. Should or can the circuit court properly invent two "general verdicts" for one cause of action under the Rule 49(a) circumstances applicable here? By what authority under the federal rules of civil procedure can it do so? Can a waiver under purported Rule 51 be imposed retrospectively here? and others. This case does not lie outside the circuit court arena of conflict. It is squarely within. It epitomizes the tensions. Indeed, it aggravates them, as we now show.

A. Verdicts Inconsistent Under the Jury Instructions.

While, at respondent's insistence, the jury was permitted to consider both the negligence and strict products liability claims, contrary to respondent's opposition, the charge here did *not* permit the jury to find negligence without also finding a defect. Instead, the charge, which both respondent and petitioner requested, made clear that the jury could *not* find Ford negligent if it found that the product was not defective. Respondent's quoted excerpts from the jury charge are grossly incomplete. The omitted portion is fatal to respondent's main argument. (A copy of the jury instructions with regard to strict products liability and negligence is annexed hereto as an Appendix). The instructions on negligence specifically provided that:

> *If, however, you find that the product was not defective when put on the market by Ford*, or that in its defective condition the 1991 Aerostar was not reasonably certain to be dangerous when put to normal use, or that Ford used reasonable care in designing, inspecting and testing the cruise control system in the 1991 Aerostar and had no knowledge of the defect when the product was put on the market, *you will find that Ford was not negligent*. (Emphasis added, Appendix, *infra*, p. 5a).

The district court's subsequent instruction permitting the jury to consider the damages issue if they found either negligence or defect, did not eliminate respondent's need to prove each element of the negligence claim which, according to the jury instructions in this case, required finding the existence of a defect.

In the face of this unequivocal language in the charge,

any claim that the verdicts were not inconsistent simply cannot be sustained. Indeed, both the district court (Appendix B to the petition, pp. 78a-84a), and circuit court (Appendix A to the petition, pp. 35a-46a) ruled that the verdicts in this case were inconsistent. That determination was premised on New York law of strict products liability which has recognized that negligence and strict products liability are "functionally synonymous". *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 257-58 (1995). The point of departure between the circuit court and district court was with regard to the appropriate procedures to be followed by the parties and court when confronted with an inconsistent verdict, *precisely the issue presented for review in Ford's petition*. Indeed, the very essence of the panel majority's decision is Ford's purported waiver of the inconsistency by not objecting under Rule 51 rather than Rule 49 – a waiver issue the circuit court plainly need not have decided if no inconsistency existed.

B. Rule 51 Holding Aggravates Circuit Court Conflict

Disregarding the provisions of Fed.R.Civ.P. 49 ("Rule 49"), which sets forth the procedures to be followed in the event that a jury renders findings which are inconsistent, and ignoring the verdict sheet itself which is entitled "Special Verdict Questions" and which asks the jury to "find" on multiple factual issues,[1] the assertions of *both respondent and petitioner* that this case is governed by Rule 49, and the holding by the district court that Rule 49 applied, the second circuit majority nevertheless concluded that the verdict in this case was

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[1] Rule 49(a) explicitly refers to a "special verdict" and to "findings" of the jury on factual issues — language expressly used in the verdict sheet here, clearly evidencing the intent of all concerned. See Appendix A to petition at pp. 69a-73a.

not a special verdict but rather consisted of two general verdicts. Because the federal rules do not recognize or provide for the use of more than one general verdict in one cause of action, and do not set forth a procedure to follow in the event that a jury should issue conflicting general verdicts, the second circuit created its own rules and procedures and applied them retrospectively to the parties in this case to create a waiver where none existed or was intended. See Petition at pp. 23-25.

Contrary to respondent's assertion, the fact that the circuit court cited to Fed.R.Civ.P. 51,[2] a rule which governs the need to object to jury charges (as opposed to verdicts), as support for its unprecedented procedures, does not take this case out of the web of conflict which admittedly surrounds Rule 49. Rather, the panel majority's post-hoc creation of a Rule 51 procedure to deal with its newly-minted "two general verdicts" invention entangles the case even further into the web by exacerbating the conflict. Thus, respondent's assertion that "nowhere in the Petition is there any reference, however, to any decision of any Court of Appeals in conflict with the decision of the court below in this case, in any respect" (respondent's opposition, p.3), is incredible. It ignores the fact that other circuit courts, when presented with a verdict sheet like the one used in this case, deemed the resulting verdict a "special verdict" governed by Rule 49 (see cases cited in the petition at

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[2] While respondent blithely and opportunistically categorizes this case as one governed by Rule 51 (respondent's opposition, pp. 3-5), respondent failed to cite Rule 51 in her submission to the district court or in either of her briefs to the second circuit. This further undermines any suggestion that Rule 49 does not apply and is not at issue here, and precludes respondent from relying on this argument to avoid review by this court.

p. 23), and the fact that, at the time the Petition was filed,[3] no other circuit had recognized that two general verdicts could be rendered in one cause of action (Appendix A to petition, pp. 55a-60a).

C. Conflict in the Circuit Courts Should be Resolved.

In fact, this case is the perfect vehicle for resolving the massive conflict in the federal courts with regard to inconsistent verdicts because it will give the Court an opportunity to address any or each facet of the controversy, from the creation of the verdict sheet to the preservation of error to the resolution of the dilemma created when a court is confronted with inconsistent verdicts. This case presents basic core issues ubiquitously found in federal trial practice and which supposedly are to be governed by uniformly applied federal rules of civil procedure. As shown in the petition, these issues arise either as a cause or as a result of the conflict that exists among the circuit courts in this area of practice. That they are properly presented here is evidenced by the conflict between the majority and the dissent. The Court's resolution of any, several or all of these following issues, clearly presented in this case, would help dissipate conflict and provide much needed guidance to the trial bench and bar and to divided circuit courts.

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[3] Since this petition was filed, the eleventh circuit, in *Mason v. Ford Motor Company*, 2002 U.S. App. LEXIS 20200 (11th Cir. 2002), citing the circuit court's opinion in this case, deemed the inconsistent verdict sheet at issue in *Mason* as one which provided two general verdicts, but declined to apply Fed.R.Civ.P. 51 to determine the procedures applicable and created its own procedures instead. *Mason* underscores the need to grant certiorari here before more mischief ensues on so cardinal a question as "what is a general verdict?" and before an already confused area of practice becomes hopelessly so.

1. What is a general verdict and can there be more than one general verdict for one cause of action? (See, petition pp. 19-23, contrast majority opinion, Appendix A, pp. 35a-40a, with dissenting opinion at pp. 57a-60a);

2. What is a "special verdict" under Rule 49(a) and what is a "general verdict accompanied by interrogatories" under Rule 49(b)? (See cases cited at pp. 18-19 of the petition, contrast majority opinion, Appendix A, pp. 38a-40a, with dissenting opinion at pp. 60a-67a,);

3. Who determines the nature of a verdict, the district court, the parties or the circuit court, and what is the standard of appellate review for such determinations? (See cases cited at p. 21 of the petition, contrast majority opinion, Appendix A, p. 46a, with dissenting opinion at pp. 67a-68a);

4. How is a claim that a verdict is inconsistent preserved and what is the interplay, if any, between Rule 49, Rule 51 and Rule 46? (See cases cited at pp. 17-18 of the petition, contrast majority opinion, Appendix A, pp. 40a-51a, with dissenting opinion at pp. 61a-62a, 67a-68a);

5. Who determines whether a waiver of an inconsistency took place, the district court or the circuit court and what standard of appellate review applies? (See petition at p. 23, contrast majority opinion, Appendix A, p. 46a, with dissenting opinion at pp. 65a-66a).

6. What is the effect of a purported waiver, does it vitiate the inconsistency and permit entry of judgment? (See cases cited at pp. 11-13 of the petition, contrast majority opinion, Appendix A, pp. 46a-51a, with

dissenting opinion at pp. 62a-64a); and,

7. What is the appropriate relief to be granted in the event that the jury renders an inconsistent verdict, i.e., should the issues be resubmitted to the jury, should the matter be set down for a new trial, or should judgment be entered? (See cases cited at pp. 11-13 of the petition, contrast majority opinion, Appendix A, pp.51a-54a, with dissenting opinion at pp. 60a-67a).

As Ford demonstrated in its petition and respondent appears to concede, there is a recurring conflict among the circuits as to virtually each and every one of these fundamental issues.[4] These are not esoteric issues which are unlikely to arise or which will not impact on the rights of the parties. Rather they are issues which go to the core of the right to trial by jury as guaranteed by the Seventh Amendment. For example, how can so basic and cardinal a question as "what is a general verdict" or "what is a special verdict" engender such confusion

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[4] Indeed, since the decision of the panel majority here, at least five other circuit courts have issued decisions addressing one or the other of these issues with disparate results. See, *e.g.*, *Mason v. Ford Motor Co.*, 2002 U.S. App. LEXIS 20200 (11th Cir. 2002) (where jury renders two inconsistent general verdicts failure to object before jury is discharged constitutes waiver); *Babcock v. General Motors Corp.*, 299 F.3d 60 (1st Cir. 2002) (objection to jury instructions before deliberations begin insufficient to preserve claim of inconsistent verdict - objection must be raised after verdict is rendered and before jury is discharged); *Watkins v. City of San Diego*, 2002 U.S. App. LEXIS 10220 (9th Cir. 2002) (no inconsistency can be claimed if issue was not properly framed on the verdict form); *McHugh v. Olympia Entertainment, Inc.*, 2002 U.S. App. LEXIS 10312 (6th Cir. 2002) ("we should be deferential to the determination of inconsistency made by a district judge"); *3M v. Chemque, Inc.*, 303 F.2d 1294 (Fed. Cir. 2002) (argument at district court that verdicts could be reconciled precludes argument on appeal that verdicts were inconsistent).

and discord? These issues are essential to application of Rules 49(a) and 49(b). Or for example, here, Ford was retrospectively deemed to have waived its constitutional right to enforcement of the jury verdict of "no defect", despite Ford's compliance with the provisions of the rules deemed applicable by the parties and actually applied by the district court, and despite the fact that no waiver was intended or contemplated by the parties or the trial court. Such unjust, unintended waivers will continue to occur unless the issues presented by this petition are resolved and uniform procedures are put into place to govern disposition of inconsistent verdicts. Only this Court can clarify how the uniform system of practice envisioned by adoption of the federal rules of civil procedure extends to the realm of inconsistent verdicts. This case is apt for this Court's review.

Respectfully submitted,

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not true -- then that element will have been proved by a preponderance of the evidence.

The standard described refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal case. That requirement does not apply to a civil case such as this, and you should put it out of your mind.

Plaintiff bears the burden of proof on most of the issues involved in this case, and defendant bears the burden of proof on one issue. So, unless I note otherwise, plaintiff bears the burden of proof.

Plaintiff brings this action on the basis of two theories of liability: Negligence and strict liability. The two causes of action are similar, so let me first explain to you the difference, because it is important so that you can distinguish the two.

In determining whether the defendant was negligent, your focus should be on whether or not the defendant knew or should have known -- sorry, that's a mistake. Let me start that again.

In determining whether the defendant was negligent, your focus should be on whether the defendant knew of some

foreseeable harm arising from the use of the product. In contrast, in determining the issue of strict liability, your focus should not be on the defendant's conduct or knowledge, but on the way the product is designed - -

Let me start that again, sorry.

In contrast, in determining the issue of strict liability, your focus should not be on the defendant's conduct or negligence, but on whether the product, as designed, was effective.

Put another way, the negligence claim raises the question of whether Ford acted reasonably in selecting the design for the 1991 Aerostar cruise control system, whereas the strict liability claim focuses on the question of whether the cruise control system itself was unreasonably dangerous. I will charge you first on the strict liability claim.

A manufacturer who sells a product in a defective condition is liable for injury which results from use of the product when the product is used for its intended or reasonably foreseeable purpose.

A product is defective if it is not reasonably safe, that is, if the product as designed is so likely to be harmful to persons ox property that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed as designed. It is not necessary to find that the manufacturer knew or should have known of a product's potential for causing injury in order to determine that it was not reasonably safe. It is sufficient that a reasonable person who did in fact know of the design's potential for

causing injury and of the available alternative designs would have concluded that the product should not have been marketed in that condition. The conclusion should be based upon a balancing of the risks, if any, and usefulness of a product as against the risks, if any, usefulness, and additional costs of an alternative design.

The plaintiff has the' burden of proving that the design of the cruise control system was not reasonably safe. You must decide whether the design of the cruise control system of the 1991 Aerostar considered in its entirety was defective. For purposes of this case, you should consider the cruise control system along with the throttle body and the braking system. I will not repeat that description, but you should keep it in mind when I refer to the cruise control system. Stated generally, plaintiff claims that the cruise control was defectively designed because the servo received electrical current as soon as the ignition was turned on, thus permitting simultaneous random electrical events to result in a wide open throttle condition.

Plaintiff also claims that the cruise control system was defective in design in that it contained no failsafe mechanism. Specifically, plaintiff maintains that the braking system, including the dump valve, was not a sufficient safety device. Ford, on the other hand, basically maintains that there was no defect in the cruise control system, because the simultaneous random electrical events posited by plaintiff's witness, Samuel Sero, are highly unlikely to occur, and further, even assuming that the Aerostar van experienced an unwanted sudden acceleration, application of the brakes would open the dump valve and would turn the throttle to idle. In determining whether the cruise control system in plaintiff's 1991 Ford Aerostar was or was not reasonably safe as designed, you should weigh all

the evidence and balance the risks of this design against its utility.

In balancing the cruise control risks against its utility, you may, but are not limited to or required to consider the following factors:

1. The likelihood that the cruise control system as designed will cause injury;
2. The utility cruise control to the public as a whole and to the individual user;
3. The technological and economic feasibility of safer design;
4. The plaintiff's awareness of the danger and ability to have avoided the injury by careful operation of the vehicle; and
5. Ford's ability to spread the cost of any safety related design changes.

After weighing the evidence and balancing the cruise control system's risks against its utility, you will decide whether the cruise control system of plaintiff's 1991 Aerostar was or was not reasonably safe as it was designed. If you conclude that the cruise control system was reasonably safe as designed, you will find that it was not defective. If you conclude that it was not reasonably safe as designed, then it was defective.

A manufacturer of a product which is reasonably certain to be dangerous if defectively made -- I'm sorry.

A manufacturer of a product which is reasonably certain to be dangerous if defectively made, owes a duty to use reasonable care in the manufacture of a product, so that it will

be reasonably safe for its normal uses. Reasonable care means that degree of care which a reasonably prudent manufacturer of such a product would use in the design of the product and the materials and parts of which it is made in order to produce a reasonably safe product.

If you find that the cruise control system in the 1991 Aerostar, which plaintiff claims caused her injury, was defective when put on the market by Ford Motor Company, that with such a defect, the vehicle was reasonably certain to be dangerous when put to normal use, that Ford failed to use reasonable care in designing the cruise control system or in inspecting it or testing it for defects, or that even though Ford used reasonable care in designing, inspecting and testing the cruise control system in the 1991 Aerostar, that Ford learned of the defect before putting the product on the market and did nothing about it, you will find that Ford was negligent. If, however, you find that the product was not defective when put on the market by Ford, or that in its defective condition the 1991 Aerostar was not reasonably certain to be dangerous when put to normal use, or that Ford used reasonable care in designing, inspecting and testing is cruise control system in the 1991 Aerostar and had no knowledge of the defect when the product was put on the market, you will find that Ford was not negligent.

If you find that the cruise control system in the Aerostar was not defective and that Ford was not negligent, you will not reach the issues raised in the remainder of the charge.

If, however, you find either that Ford was negligent in the design of the 1991 Aerostar cruise control system, or that the 1991 Aerostar cruise control system was itself defective,

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you must next consider whether that negligence or defect was a substantial factor in causing plaintiff's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as the cause of the injury. If you find that neither defendant's negligence nor the cruise control defect was a substantial factor in causing the injury, then plaintiff may not recover.

If you find that either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you will proceed to consider comparative fault. Only after that will you determine the question of damages.

If you find either defendant's negligence or the cruise control defect was a substantial factor in causing plaintiff's injury, you must next consider whether the plaintiff was also negligent, and whether plaintiff's conduct was also a substantial factor in causing the accident.

To determine whether plaintiff was negligent, you should determine whether plaintiff took or failed to take actions that a reasonably prudent person would have taken under the circumstances.

You should also apply the same definition of substantial factor discussed earlier, that is, would a reasonable person regard plaintiff's negligence, if any existed, as a cause of the injury. In doing so, you should